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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

DR. MARGIE MCRAE, PETITIONER

v.

RUSSELL BERGER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether there is arguable probable cause for arrest when the sworn arrest warrant affidavit, presented to and signed by a magistrate, negates the elements of any crime.

2. Whether there is arguable probable cause for arrest for an unwitnessed alleged misdemeanor.

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Petitioner Margie McRae, M.D. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The unreported opinion of the Court of Appeals is reproduced in the appendix at APP. 1a. The opinion of the District Court granting Defendant Berger's motion for summary judgment is unreported and is reproduced in the Appendix at App. 3a.

JURISDICTION

The court of appeals judgment was entered on March 22, 2006. A timely petition for rehearing was denied on May 12, 2006. Appendix at App. 12a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

RELEVANT PROVISIONS INVOLVED

1. The Warrant Clause of the Fourth Amendment to the United States Constitution provides that:... "

O.C.G.A. Section 32-10-64(e)

O.C.G.A. Section 16-8-4

O.C.G.A. Section 16-8-2

STATEMENT

Plaintiff seeks review of the ruling of the

Eleventh Circuit Court of Appeals which held that police officers may arrest if there is arguable probable cause citing *Devenpeck v. Alford*, 160 L.Ed. 2d 537, 544 (2004).

Petitioner seeks review of the Eleventh Circuit's ruling because it did not address an issue of Constitutional significance that has not been directly addressed in the past. The questions address whether arguable probable cause exists when the face of the sworn arrest warrant affidavit is not merely inconsistent with a crime, but rather negates the elements.

This petition arises out of a controversy over a 35 cent toll on the Torras Causeway from Brunswick, Georgia to St. Simons Island, Georgia. Petitioner, a medical doctor and lawyer licensed to practice in California, owns property on St. Simons Island, Georgia and traveled to the area frequently.

When petitioner drove onto the Torras Causeway on March 2, 2003, headed to St. Simons Island to check her property, she entered the exact change lane and attempted to pay the toll, but missed the basket. She had over three thousand dollars in cash and some coins, but did not have any more exact change. Petitioner waited for a time for assistance, but no one came. She then spotted her coins on the ground near the toll machine, got out of her truck, picked them up and paid the toll. The controlling Georgia statute, O.C.G.A. Section 32-10-64(e) authorized a person who has missed the basket to retrieve his or her coins that fell to the ground near the toll machine.

> "After placing the coins in the basket, McRae got in her truck and began to exit the area slowly. However, a Georgia Department of Transportation toll booth operator, Marilyn Rogers, impeded McRae's departure by running in front of McRae's truck and telling her to stop. Rogers saw coins in McRae's hand, and was under the impression that McRae had been taking coins that were not her own from the roadway near the toll booth. Upon Rogers' demand that McRae give Rogers the change in her hand, McRae refused."

(District Court opinion, App. 4a.) "McRae told Rogers she was not going to give Rogers her money. McRae asserts that Rogers did not see her when she first approached the basket, or when she attempted to pay, but missed the basket." Ibid.

> "Rogers threatened to call the police if McRae refused to hand over the money, and McRae agreed to pull over and wait for the police. Berger was the Brunswick police officer who responded to the call. Upon Berger's arrival, Rogers told the officer that she had seen McRae picking up numerous coins all around the coin basket, and that she saw McRae deposit thirty-five cents in the toll basket." (District Court opinion, App. 5a).

> "Rogers did not tell Berger that he [*sic*] saw how the coins came to be on the ground, or how many coins she had seen McRae picking up, she did relate to Berger her understanding that any money that falls on the ground at the toll

booth becomes state property automatically." (District Court opinion, App. 5a.)

"McRae contends that Berger approached her vehicle, and told her 'I can arrest you.' McRae responded that she could not be arrested on hearsay. Berger then told McRae to give the money back, and McRae responded that there was no proof that the money belonged to the state[2]. When Berger asked McRae if she was going to pay the toll, Plaintiff responded that she had already done so. Berger then took McRae's license and went to his police cruiser to run a license and registration check."

(District Court opinion, App. 5a). The Court noted, "fn2 During Berger's deposition, he admitted that at no point did he ask McRae specifically if the money she retrieved from the ground was her own." (District Court opinion, App. 11a.).

"When Berger returned to McRae's pickup, McRae stated 'I've already paid the toll, but here's a dollar I'll pay again.'" (District Court opinion, App. 5a.) "After a discussion about the ownership of her truck and where she got it, Berger arrested McRae and charged her with theft by conversion." (District Court opinion, App. 5a - 6a).

After Dr. McRae's arrest, Cpl. Hall, Berger's supervisor, presented a sworn affidavit to the magistrate stating that he, Hall,

> "...personally makes oath that MCRAE, MARGIE (hereinafter call the Accused) did prior to or, at 01:02pm, on the 03 day of March, in the year 2003, in the county aforesaid, at 200 TORRAS CAUSEWAY, commit the offense of THEFT BY CONVERSION (O.C.G.A. 16-8-4) against STATE OF GEORGIA in that said Accused did then and there after having obtained property lawfully, did then without authority convert said property to HER own use to wit: MARGIE MCRAE EXIT HER CAR AT THE DOT TOLL BOOTH, PICKED UP MONIES AROUND THE TOLL MACHINES, BELONGING TO THE STATE AND USED IT TO PAY HER TOLL, thereby depriving the lawful owner, State of Georgia, Department of Transportation, of said property, and this deponent makes this affidavit that a warrant may issue for his (her) arrest." (emphasis in original).

The statement was sworn to by supervisor Hall and subscribed. Hall correctly affirmed, under oath, that Dr. McRae had obtained the money lawfully.

REASONS FOR GRANTING OF THE PETITION

QUESTION NO. 1

Whether there is arguable probable cause for arrest when the sworn arrest warrant affidavit, presented to and signed by a magistrate, negates the elements of any crime. This is an important Constitutional issue of general concern that has not been addressed by this Court. The answer should be,

No, because it would lower the threshold for possible unlawful arrest to a level that eliminates most safeguards that may prevent wrongful deprivation of freedom. Such a holding would effectively abolish standards of behavior, guidelines and balancing that protect the freedom on which this Country was founded, and for which this Country is an example for the rest of the world.

A focus was the adequacy of the investigation done by Brunswick police officer, Berger, but the threshold analysis, arguable probable cause under the *totality of circumstances*, is an even more primary concern as discussed infra.

A Probable Cause and Arrest Warrant Affidavit

Probable cause was defined by Justice Marshall a few hundred years ago, but it was refined by the Supreme Court in the landmark mark case, *Brinegar v. United States*, 338 U.S. 160,175 - 176, 69 S.Ct. 1302. *Brinegar* held that "Probable cause exists where 'the facts and circumstances within their [the officer's] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed" citing *Carroll v. United States*, 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543, 39 A.L.R. 790. Like Paganini's theme, there are many variations, but the core concept remained unchanged till the development of arguable probable cause discussed infra. *Brinegar* noted that judgment in a particular situation must consider the totality of circumstances. Id at 176. Thus the totality of circumstances standard dates back to at least 1949.

The Court recognized that mistakes could be made, but they should be the mistakes of reasonable men. Id at 175. These long-prevailing standards were intended to safeguard citizens from unfounded charges of crime while allowing officers leeway. The rule of probable cause was intended to accommodate these competing interests. Id at 176.

The Warrant Clause of the Fourth Amendment to the United States Constitution, enforced against the states through the Fourteenth Amendment per *Aguilar v. State of Texas*, 378 U.S. 108, 110, 84 S.Ct. 1509 (1964), citing *Ker v. California*, 374 U.S. 23, 83 S.Ct. 1623, 10 L.ED.2d 726, states that, "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation....", *Franks v. Delaware*, 438 U.S. 154, 166, 98 S.Ct. 2674, 2681, 57 L.Ed.2d 667 (internal citations omitted) also noting the requirement that the warrant be issued by a neutral and disinterested magistrate. The Court said, "This case presents an important and longstanding issue of Fourth Amendment law." This case allowed defendants to challenge the veracity of a warrant affidavit at a hearing, addressed possible remedies, and limited the showing of support for probable cause to the face of the warrant affidavit..

At page 2684, the Supreme Court wrote, "There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. Applying that presumption to the instant case, Cpl. Hall's arrest warrant affidavit, must be presumed valid and Dr. McRae did indeed lawfully come into possession of the money in question as admitted by supervisory police

officer Hall in his sworn statement. This observation does not resolve the conundrum of how and why the State of Georgia, inferentially, gave Dr. McRae money that she allegedly then converted to her own use. Citing the rule in *Giordenello v. United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2 1503 (1958) and other precedence, the Supreme Court eschewed mere affirmance of belief or suspicion because "[m]ere affirmance of belief or suspicion is not enough." for a warrant. "Fourth Amendment cases findings of reasonableness or of probable cause necessarily rest on the facts and circumstances of each particular case." *Aguilar* at 1516.

The Supreme Court, in another landmark case, *Giordenello v. United States*, 357 U.S. 480, 485 - 486, 78 S.Ct. 1245, applied the search warrant standards to arrest warrants. The affidavit must be presented to a neutral, detached magistrate, who would determine whether the warrant was supported by probable cause, rather than the officer who might be engaged in the frequently competitive activity of ferreting out crime. Id at 486. An adequate basis for a finding of probable cause had to be on the face of the complaint in the *Giordenello* criminal case or affidavit in Fourth Amendment cases. Id at 487. The *Giordenello* complaint was deficient because it contained no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein and did not indicate a source for the complainant's belief. *Giordenello* was expanded in *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

While recognizing that probable cause could be satisfied by hearsay information, the Supreme Court

held the *Aguilar* affidavit deficient for two reasons. First, the underlying facts necessary to enable the magistrate to independently judge the validity of the informant's conclusion were not presented and second, the affiant officers did not address the credibility of their informant. *Aguilar* was such an important case that this Court granted certiorari for *Spinelli v. United States*, 393 U.S. 410, 413, 89 S.Ct. 584 (1969) "Believing it desirable that the principles of *Aguilar* should be further explicated,..." The *Spinelli* warrant was deficient because the affidavit presented to the magistrate fell short of the *Aguilar* standard for a showing of probable cause. *Spinelli* at 590. Recognizing that magistrates' determinations of probable cause should be paid great deference by reviewing courts, the Supreme Court wrote, "But we cannot sustain this warrant without diluting important safeguards that assure that the judgment of a disinterested judicial officer will interpose itself between the police and the citizenry."

There is a parallel in this case. It is conceded that complainant Rogers had no knowledge of how the coins got on the ground or how many there were. She had no knowledge of what Dr. McRae had picked up, thirty five pennies, or seven nickels, or three dimes and a nickel or any other combination that would add up to thirty-five cents. In his sworn affidavit, Hall admitted that Dr. McRae had lawfully come into possession of the coins she picked up. There was no personal observation of any of Dr. McRae's behavior before toll collector Rogers saw her pick up coins from the ground near the toll booth. As discussed above, there is a presumption of validity with respect to the warrant affidavit, though *Franks* makes it clear that challenge

is permitted. One would hardly expect the affiant to challenge the validity of his own sworn statement. For the charge of conversion, Dr. McRae would have to have lawfully gotten the coins from the alleged victim, the State of Georgia. Since Hall admitted that they came into Dr. McRae's possession lawfully, theft by taking, an alternative charge, was impossible.

Failing to meet the elements of a crime is one thing, but actually negating them is a different, and more compelling, issue. The *ex post facto* arrest warrant, after completion of the custodial warrantless arrest of Dr. McRae, is deficient on its face. The elements are not merely lacking for theft by conversion, theft by taking, O.C.G.A. 32-10-64(e) and any other crime. They are negated.

In *Stone v. Powell*, 428 U.S. 465, 472, 96 S.Ct. 3037 (1976), the United States District Court for Nebraska concluded that a search warrant was invalid because the supporting affidavit was defective under *Spinelli* and *Aguilar* cited above. The District Court limited its probable cause inquiry to the face of the affidavit. The petitioner urged that the police should be able to augment the information on a search warrant affidavit at a suppression hearing, a contention noted by the Supreme Court to have been rejected by that Court several times.

It is a matter of common knowledge that motorists not uncommonly miss the basket at toll plazas. The conclusion arrived at for this unwitnessed event is not reasonable under the *totality of circumstances* articulated by this Court in *Brinegar*, supra. None of these individuals observed, or knew,

any of the events that preceded Dr. McRae's retrieval of her coins authorized by Georgia law, O.C.G.A. 32-10-64(e). Rogers' unfounded belief that money that fell to the ground belonged to the State begs the question whether a person who drops a twenty dollar bill at the State building in Atlanta loses her money to the State. Does fallen money transmute to become State property only when it falls to the ground, or only at toll plazas, and what legitimate State interest would be satisfied by such a policy or rule?

The elements for a crime are not simply lacking here. They are negated by the sworn statement of supervisor, Cpl. Hall, an obviously experienced police officer. The arrest warrant is deficient on its face and there was not even arguable probable cause for the arrest of Dr. McRae under the *totality of circumstances* and the fact that a material portion of what transpired in this misdemeanor allegation over a thirty-five cent toll was not witnessed by complainant Rogers or any police officer, i.e. what Dr. McRae did before Rogers saw her, how the coins got on the ground, how many coins were in issue and the value of those coins. This is the very behavior that concerned this Court in *Giordenello* supra. Arguable probable cause gives a lot of latitude to law enforcement officers, but there must also be the balance this Court discussed in *Giordenello.*

The District Court decision was based on immunity derivative of *arguable probable cause* and that, too, must fail for the same reasons. Arguable probable cause may be present if probable cause is lacking. *Fletcher v. Screven County, GA.* 92 F.Supp.2d 1377 is a year 2000 Georgia case. Quoting a 1999 Eleventh Circuit holding, *Jones v. Cannon,* 174 F.3d

1271, 1278, the Court wrote, "...qualified immunity applies 'if there was ***arguable*** probable cause for the arrest..'" (emphasis in original). The officer was immune '"if a reasonable police officer, knowing what [Kile] knew, could have believed there was probable cause' for obtaining the arrest warrant." Neither complainant Rogers, nor Hall, nor Berger saw how the coins picked up by Dr. McRae got on the ground. None knew how many coins there were. Hall admitted in his sworn statement that Dr. McRae had come into possession of the coins lawfully and is incapable of explaining the circumstances under which the State of Georgia gave Dr. McRae the money she allegedly converted. His statement negates conversion. Theft of money one possessed lawfully is impossible. O.C.G.A. 32-10-64(e) was not violated. Under the totality of circumstance at that toll plaza, it was arguably not reasonable to take the quantum leap to the conclusion that a motorist was stealing money from the State or any of the other crimes posited. Arguably, a well trained officer who patrolled the causeway should be familiar with O.C.G.A. 32-10-64(e), which authorizes a person to pick up his or her coins near a toll when the basket is missed.

O.C.G.A. 16-8-4 is the Georgia statute for theft by conversion, the charge against Dr. McRae. The elements for that crime are not met as Dr. McRae would have first had to lawfully obtain the coins from the State, then convert them to her own use in violation of an agreement or legal obligation. The question was never addressed explaining how Dr. McRae obtained coins from the State of Georgia that she subsequently converted to her own use.

O.C.G.A. 16-8-2 requires that the accused either unlawfully take property from another or lawfully obtain it and refuse to return it. That element can not be met under the totality of the circumstances at that Torras Causeway toll booth at the time of the arrest of Dr. McRae. Probable cause is not possible, and Cpl. Hall's affidavit confirms that impossibility.

There is no crime in this case, as the elements are not met for any crime under statute or common law.

There is no apparent support for arguable probable cause for this warrantless arrest and it should not be salvaged by an *ex post facto* warrant that, on its face, negates any crime. Analysis and decision by this Court would settle that important Constitutional question.

B. Qualified Immunity

Officers performing discretionary duties may have qualified immunity, but that immunity can be lost. *Saucier v. Katz*, 533 U.S. 194, 200, 121 S.Ct. 2151 described a two part test. The Court would first decide whether a constitutional right would have been violated on the facts alleged, then determine whether the right was clearly established. Neither point is a matter of controversy in this case as both prongs are clearly met. In another Georgia case, *Joseph v. Kimple*, 343 F.Supp.2d 1196, the Court acknowledged, "...it was clearly established law that a police officer would *not* be protected by qualified immunity if he applied for an arrest warrant where 'a reasonably well-trained officer ... would have known that his affidavit failed to establish probable cause and that he should not have

applied for the warrant..' *Garmon v. Lumpkin County, Georgia*, 878 F.2d 1406, 1410 (11th Cir.1989);" (emphasis in original).

In order to avail himself, or herself, of the immunity available, that immunity is qualified and the behavior must be reasonable and such that a reasonable police officer, knowing what the involved officer knew, could have believed there was probable cause for obtaining an arrest warrant, *Fletcher v. Screven County, Georgia*, 92 F.Supp.2d 1377, 1380 (S.D.Ga. 2000). The officer's subjective belief is irrelevant.

Gramenos v. Jewel Companies, Inc., 797 F.2d 4322, a Seventh Circuit case, noted expansion of the official immunity of *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), a case of national interest. But immunity is limited to qualified immunity or good faith.

C. Arguable Probable Cause

Another Georgia court, *Payne v. DeKalb County*, 414 F.Supp.2d 1158, 1172 wrote, "To determine whether an officer has probable cause to make an arrest, one must first identify the elements of the statute used to arrest the suspect and compare the evidence, known to the arresting officer, with these elements." The question presented seeks to answer how arguable probable cause applies in this circumstance. In *Payne*, one officer was deemed to have arguable probable cause because he relied on a representation that a magistrate was going to issue an arrest warrant for the arrest of the plaintiff. Another officer, after analysis by the court, was not entitled to

immunity based on that officer's conduct. The result was similar in *Kingsland v. City of Miami*, 382 F.3d 1220, a 2004 Eleventh Circuit case, in which officers engaged in transparent wrongdoing to protect a fellow officer who was involved in an automobile collision with plaintiff.

Arguable probable cause appears not tenable in the case under consideration, based on the *totality of circumstances* discussed above and affiant Hall's sworn statement that negates any crime. There was no conversion as the State, obviously, never gave Dr. McRae any monies that she subsequently converted to her own use, and there was no theft by taking as Hall acknowledged that Dr. McRae had obtained the monies lawfully.

Additionally, Dr. McRae's behavior was authorized by a specific Georgia statute, O.C.G.A. 32-10-64(e), as discussed above.

There was no exigency as noted in the District Court opinion. Dr. McRae left the toll plaza slowly. She waited for Officer Berger. The amount involved was de minimis, thirty-five cents.

For the reasons discussed, petitioner respectfully requests review by this Court to address the question presented that is of general Constitutional concern:

Whether there is probable cause for arrest when the sworn arrest warrant affidavit, presented to and signed by a magistrate, negates the elements of any crime.

QUESTION NO. 2

A. Arguable Probable Cause

Whether there is arguable probable cause for arrest for an unwitnessed misdemeanor. This is an important Constitutional issue of general concern that has not been addressed by this Court. The answer should be, No, because the cost to society is too great. The lives of many law abiding, productive citizens are subject to irreparable disruption based on mere suspicion or belief that a minor wrong has been perpetrated. Accusations based on unwitnessed behavior are inherently subject to misinterpretation or misunderstanding and the adverse impact on the person affected can be considerable. There should be a balance between the interests of law enforcement and the interests of the people to be protected by the Constitutional safeguards.

Gramenos v. Jewel Companies, Inc., 797 F.2d 4322, a Seventh Circuit case, contained an extensive policy discussion of arrest for a misdemeanor starting with the common law rule that an officer may make a custodial arrest for a misdemeanor only if the crime was committed in his presence.

> "The rule reflects a widely-held belief that misdemeanors should be prosecuted by citation unless the officer has seen the crime committed, which greatly reduces the chance of mistaken arrest. Those stopped for misdemeanors such as traffic offenses usually are cited and released on the spot after posting bond. Most reports of

> misdemeanors will not produce a sentence of custody (as opposed to a fine or probation), so a custodial arrest itself becomes a substantial part of the penalty." (*Gramenos* at 441).

"The A.L.I. Recommends a statute allowing a custodial arrest for a misdemeanor if the officer has reasonable cause to believe that the suspect will not appear in response to a summons or will injure himself or others." (*Gramenos* at 441). The District Court noted, in its opinion, that Dr. McRae had started driving off slowly and waited for the police. Officer Berger admitted that Dr. McRae's actions suggested that "she wouldn't have thought that she committed an offense." [R-19-(Berger depo. At 47)]. No exigent circumstances were described.

In *Aguilar v. State of Texas*, 378 U.S. 108, 110, 84 S.Ct. 1509, the Supreme Court wrote, "We granted a writ of certiorari to consider the important constitutional questions involved." In its discussion, the Court cited *Nathanson v. United States*, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed 159 at *Aguilar*, p. 112, "The Court, noting that the affidavit 'went upon a mere affirmation of suspicion and belief *without any statement of adequate supporting facts*,' id., 290 U.S. at 46, 54 S. Ct. at 13 (emphasis added), announced the following rule:

> 'Under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefore from *facts or circumstances* presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough.'

Id., 290 U.S. at 47, 54 S.Ct. at 13. (Emphasis added.)."

It is settled that Fourth Amendment standards for search warrants apply to arrest warrants, *Giordenello v. United States*, 357 U.S. 480, 485 - 486, 78 S.Ct. 1245, 2L.Ed.2d 1503. Complainant Rogers admitted that she did not see any of the events before she saw plaintiff picking up coins. These events occurred at a toll booth machine where, as a matter common knowledge, people miss the basket when tossing coins. Under the totality of circumstances, it may not have been reasonable for toll collector Rogers to take a quantum leap to the conclusion that Dr. McRae was stealing money rather than retrieving her property she had dropped, as authorized by Georgia law, when Rogers had witnessed none of Dr. McRae's behavior during the several minutes Dr. McRae had sat there waiting for assistance (District Court opinion, App. 4a.) Rogers subjective thoughts are irrelevant. The legal standard refers to reasonableness. By the same token, it begs the question whether a $20,00 bill dropped inadvertently at the State building in Atlanta becomes transmuted to State property simply because it landed on State grounds, what State interest would deem it so, and who might come to such a conclusion.

If the potentially draconian effects of arguable probable cause extend to misdemeanors, it would seem there should be some balance between the interest of law enforcement and the interest of the individual subjected to loss of freedom and other untoward consequences in the event of an unlawful arrest for a petty incident that was not even witnessed, as in this case, where the amount on which the false charge was

based was a de minimis thirty-five cents, less than the cost of a first class postage stamp. The District Court misstated, in its opinion, that Dr. McRae's arrest record had been expunged. That is not correct. It was correctly stated that the charge was dismissed and there was an expungement order, but there has been no expungement.

B. Qualified Immunity

The Qualified Immunity discussion above applies and is not duplicated here. A balancing of interests is reasonable and guidelines would serve the interests of both zealous law enforcement officers and those who would be protected from false arrest and charges.

For the reasons discussed, an opinion is requested of this Court as to whether there is probable cause for arrest for an unwitnessed misdemeanor.

CONCLUSION

For the foregoing reasons, a writ should be granted.

Respectfully submitted,
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(any footnotes trail end of each document)

No. 05-16527 Non-Argument Calendar

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

DR. MARGIE MCRAE,
Plaintiff-Appellant,

Versus

RUSSELL BERGER,
Defendant-Appellee.

March 22, 2006, Decided

March 22, 2006, Filed

NOTICE: NOT FOR PUBLICATION

COUNSEL: For Margie McRae, Dr., Appellant: George Brian Spears, Law Office of Brian Spears, ATLANTA, GA.

For Russell Berger, Appellee: Terry A. Dillard, Attorney at Law, Waycross, GA.

JUDGES: Before CARNES, PRYOR and COX, Circuit Judges.

OPINION: PER CURIAM:

Dr. Margie McRae appeals the summary judgment granted for Officer Russell Berger of the City of

Brunswick, Georgia Police Department. McRae's complaint alleges a federal claim for violation of her Fourth Amendment rights and state law claims for false imprisonment and wrongful arrest. The district court found that all McRae's claims fail, as a matter of law, because Berger is entitled to qualified immunity with respect to the federal claim and official immunity with respect to the state law claims. McRae's appeal challenges only the judgment on the federal claim; her appellate brief does not address the district court's finding of official immunity under state law.

On the merits of the appeal, having considered the briefs and relevant parts of the record, we find no error in the district court's grant of summary judgment. The judgment of the district court is affirmed.

AFFIRMED.

D. C. Docket No. 05-00043-CV-2.
United States District Court
for the Southern District of Georgia.

DR. MARGIE MCRAE,
Plaintiff,
versus
RUSSELL BERGER,
Defendant.

10/26/05

ORDER

Plaintiff, Dr. Margie McRae, filed the above-captioned case against Defendant, Russell Berger, asserting a federal claim for violation for her Fourth Amendment rights, and state law claims for false imprisonment and wrongful arrest.

Presently before the Court is Berger's motion for summary judgment, Because Berger had arguable probable cause to believe that McRae committed a crime, the motion will be GRANTED.

BACKGROUND

Margie McRae is a medical doctor and lawyer, licensed to practice in California. McRae owns property on St. Simons Island, Georgia, and is in the habit of visiting Georgia regularly. At about 1:00 P.M. on March 2, 2003, McRae pulled into an exact change toll booth on the F. J. Torras causeway between Brunswick and St. Simons island. At that time, a toll of thirty-five cents was required to be paid to gain admittance to the island.

McRae contends that she had the exact change required when she pulled up to the toll booth.

When McRae attempted to throw her change into the unmanned toll basket, she missed. McRae tried to locate more change in her truck to pay the toll, but could not find exact change to do so. Unsure of her next move, McRae waited in her pickup truck for about five or ten minutes. When it became obvious to her that no assistance or guidance was forthcoming from the authorities running the toll both, McRae got out of her truck, and picked up a quarter and a dime that were located near her truck. McRae alleges that these were her own coins that had missed the toll basket.

After placing the coins in the basket, McRae got in her truck and began to exit the area slowly. However, a Georgia Department of Transportation toll booth operator, Marilyn Rogers, impeded McRae's departure by running in front of McRae's truck and telling her to stop. Rogers saw coins in McRae's hand, and was under the impression that McRae had been taking coins that were not her own from the roadway near the toll booth. Upon Rogers' demand that McRae give Rogers the change in her hand, McRae refused.

McRae maintains that she refused Rogers' demand because the coins in her hand were her own - the change that she found in her truck after missing the toll[1] basket. McRae told Rogers that she was not going to give Rogers her money. McRae asserts that Rogers did not see her when she first approached the basket, or when she attempted to pay, but missed the basket.

Rogers threatened to call the police if McRae refused to hand over the money, and McRae agreed to pull over and wait for the police. Berger was the Brunswick police officer who responded to the call. Upon Berger's arrival, Rogers told the officer that she had seen McRae picking up numerous coins all around the coin basket, and that she saw McRae deposit thirty-five cents in the toll basket.

Rogers told Berger that he had demanded the return of the coins that were in McRae's hand, but that McRae refused. While Rogers did not tell Berger that she saw how the coins came to be on the ground, or how many coins she had seen McRae picking up, she did relate to Berger her understanding that any money that falls on the ground at the toll booth becomes state property automatically.

McRae contends that Berger approached her vehicle, and told her "I can arrest you." McRae responded that she could not be arrested on hearsay. Berger then told McRae to give the money back, and McRae responded that there was no proof that the money belonged to the state.[2] When Berger asked McRae if she was going to pay the toll, Plaintiff responded that she had already done so. Berger then took McRae's license and went to his police cruiser to run a license and registration check.

When Berger returned to McRae' s pickup, McRae stated "I've already paid the toll, but here's a dollar I'll pay again." Berger then asked McRae who owned the truck. Because she had already produced her vehicle registration and proof of insurance, she responded "What do you mean whose truck is this?

You just rare the registration." Berger then clarified his question by asking where Plaintiff got the truck. McRae told the officer that this information was irrelevant.

At that point, Berger told McRae to get out of her vehicle and place her hands behind her back. McRae was placed under arrest, transported to the Brunswick Police Department for booking, and detained at the Glynn County detention center. Berger charged McRae with theft by conversion. After four days in Jail, Glynn County State Court Judge Orion Douglass released McRae on her own recognizance. Subsequently, the charges against McRae were dismissed, and the record of her arrest was expunged.

SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c) provides for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

Facts are "material" if they could affect the outcome of the suit under the governing substantive law. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986).

The Court must view the facts in the light most favorable to the non-moving party, Matsushita Elec. Indus. Co. , Zenith Radio Corp., 475 U.S. 574, 587 (1986), and must draw "all justifiable inferences in his favor. . . ", United States v. Four Parcels of Real

Property, 941 F.2d 1428, 1487 (11th Cir. 1991) (en banc) (internal quotation marks omitted).

DISCUSSION

I. Berber Is Entitled to Qualified Immunity Under Federal Law

[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow Fitzgerald, 457 U.S. 800, 818 (1982). In evaluating a qualified immunity defense, the Court must first determine if the plaintiff's rights were violated at all. Wilson v. Layne, 526 U.S. 603, 609(1999). The court need not proceed beyond that inquiry in this case.

McRae argues that Berger violated the Fourth Amendment to the United States Constitution by arresting her without probable cause. Probable cause is "defined in terms of facts and circumstances 'sufficient to warrant a prudent man in believing that the [suspect] had committed or was committing the offense.'" Gerstein v. Pugh, 420 U.S. 103, 111 (1975) (quoting v. Ohio, 379 U.S. 89, 91 (1964)). "who probable cause exists depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest." Devenpeck v. Alford, 160 L.Ed. 2d 537, 544 (2004).

Yet, the probable cause inquiry is not restricted by the offense actually invoked bar the officer at the time of the arrest. Rather, the "officer's state of mind (except

for the facts that he knows) is irrelevant to the existence of probable cause." Id. at 545. In other words, it is sufficient if probable cause exists to believe that a crime was committed.

"[E]venhanded law enforcement is best achieved bar the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer." Horton v. California, 496 U.S. 128, 138 (1990).

Qualified immunity applies when then is arguable probable cause for an arrest. If under all the facts known to the officer at the time of the arrest, a reasonable officer could have believed that probable cause was present, arguable probable cause exists. Durruthy v. Pastor, 351 F. 3d 1080, 1089 (11th Cir. 2003) ; Thorton v. Macon, 132 F.3d 1395, 1399 (11th Cir. 1998).

Relevant to the facts here, Georgia law provides that:

Any person, except an authorized agent or employee of the authority, who removes any coin from the pavement or ground surface within 15 feet of a toll collection booth or toll collection machine, except to retrieve coins the person dropped while attempting payment of that Persons toll, shall be guilty of a misdemeanor.

a. Code Ann. § 32-10-64(e) (2001).

Rogers related to Berger that she had seen McRae outside her truck picking up numerous coins from all around the coin basket, and that she saw the change in

McRae's immediate physical possession after McRae deposited thirty-five cents in the toll basket. Rogers also told Berger that McRa refused to hand over the change when confronted. After discussing the events with Rogers, Berger spoke with McRae about the incident. McRae does not contend that she ever told Berger that she had only picked up her own coins from the ground. Instead, she told him that "there was no proof that the money belonged to the state." Had she explained that she had only left her truck to retrieve her coins, she may well have diffused the confrontation, and averted arrest.

Based on the facts known to Berger at the time of the arrest, a reasonable officer in his position cold have determined that probable cause existed to conclude that McRae violated the law by taking coins from near the toll booth that were not her own. Ga. Code Ann. Sec. 32-10-64(e) (2001).

McRae argues that there was no arguable probable cause to conclude that she had committed a crime because Berger did not know of his own knowledge that the coins McRae packed up were not her own. Such an argument is not well-founded. Law enforcement officials need not witness a crime take place to have probable cause to make an arrest.

McRae also asserts that Berger's knowledge that McRae picked up coins near the toll booth could not have given rise to a reasonable conclusion that the coins belonged to the state. Yet, such a fact need not be proven to support the motion that McRae violated the law. If an officer could have reasonably concluded that McRae picked up coins that were not her own, then

arguable probable cause existed to conclude that McRae violated the law. In sum, Berger is immune from suit under federal law because he had arguable probable because to believe that McRae violated Georgia Code section 32-1-64(e).

II. Berger Is Entitled to official Imununity Under State Law McRae asserts that Berger is liable for false imprisonment and wrongful arrest under Georgia law.

The Georgia Constitution provides:

(d) Except as specifically provided by the General Assembly in a State Tort Claims Act, all officers, and employees of the state or its departments and agencies may be subject to suit and . . may be liable for injuries and damages if they act with actual malice or with actual intent to cause injury in the performance of their official functions. Except as provided in this subparagraph, officers and employees of the state or its departments and agencies shall not be subject to suit or liability, and no judgment shall be entered against them, for the performance or nonperformance of their official functions. The provisions of this subparagraph shall not be waived.

Art. I, Sec. II, Par. IX (d) .

McRae concedes that a police officer's decision to arrest a citizen qualifies as a discretionary act. Under Georgia law, the doctrine of official immunity functions to shield a public employee's discretionary decisions, made in good faith, from a review of his judgment in hindsight. Cameron v. Lang, 274 Ga. 122, 123 & n. 6 (2001). Berger contends that there is no evidence that he acted with

actual malice, or with a deliberate intent to commit a wrongful act, and that he is immune from suit under Georgia law as a result. Merrow v. Hawkins, 266 Ga. 390, 391-92 (1996)

The Court agrees that there is no evidence that Berger acted with actual malice in arresting McRae. Rather, the facts demonstrate that the officer had arguable probable cause for the arrest. Berger is entitled to official immunity under Georgia law.

CONCLUSION

For the reasons explained above, Berger's motion for summary judgment is GRANTED. See Dkt. No. 13. The Clerk is directed to enter judgment accordingly.

SO ORDERED, this

JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

fn1McRae had three quarters, a nickel, and a number of pennies in her hand.

fn2During Berger's deposition, he admitted that at no point did he ask McRae specifically if the money she retrieved from the ground was her own.

fn3 Berger had arguable probable cause to conclude that McRae took coins that were not her own even though Rogers could not tell him the exact number of coins that McRae had picked up. Berger Dep. 50.

No. 05-16527 Non-Argument Calendar

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DR. MARGIE MCRAE,
Plaintiff-Appellant,

versus

RUSSELL BERGER,
Defendant-Appellee.

5/12/06

Appeal from the United States District Court for the Southern District of Georgia. D. C. Docket No. 05-00043-CV-2.

Before CARNES, PRYOR and COX, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellant is DENIED.

O.C.G.A. 32-10-64(E) EXERCISE OF TOLL POWERS

Any person, except an authorized agent or employee of the authority, who removes any coin from the pavement or ground surface within 15 feet of a toll collection booth or toll collection machine, except to retrieve coins the person dropped while attempting payment of that person's toll, shall be guilty of a misdemeanor.

O.C.G.A. 16-8-4 THEFT BY CONVERSION

(a) A person commits the offense of theft by conversion when, having lawfully obtained funds or other property of another including, but not limited to, leased or rented personal property, under an agreement or other known legal obligation to make a specified application of such funds or a specified disposition of such property he knowingly converts the funds or property to his own use in violation of the agreement or legal obligation. This Code section applies whether the application or disposition is to be made from the funds or property of another or from the accuser's own funds or property in equivalent amount when the agreement contemplates that the accused may deal with the funds or property of another as his own.

(b) When, under subsection (a) of this Code section, of officer or employee of a government or of a financial institution fails to pay on an account, upon lawful demand, from the funds or property of another held by him, he is presumed to have intended to convert the funds or property to his own use.

(c)(1) As used in this subsection, the term "personal property" means personal property having a replacement cost value greater than $100.00, excluding any late fees and penalties, and includes heavy equipment as defined in paragraph (2) of Code Section 10-1-731 and tractors and farm equipment primarily designed for use in agriculture.

(2) Any person having any personal property in such person's possession or under such person's control by virtue of a lease or rental agreement who fails to return the personal property within five days, Saturdays, Sundays, and holidays excluded, after a letter demanding return of the personal property has been mailed to such person by certified or registered mail, return receipt requested, at such person last known address by the owner of the personal property or by the owner's agent shall be presumed to have knowingly converted such personal property to such person's own use in violation of such lease or agreement.

(3) In the event that any personal property is not returned as provided for in the lease or rental agreement and the court orders the lessor or renter to pay replacement costs, replacement costs shall include but not be limited to:

(A) The market value of the personal property. The market value shall be established by the owner of the property by providing from a supplier of such or reasonably similar personal property a current quotation of the value of the person property which is of like quality, make, and model of the personal property being replaced. The value to be awarded shall e the higher of:

(I) The value on the date when the conversion occurred; or

(ii) The value on the date of the trial;

(B) All rental charges from the date the rental agreement was executed until the date of the trial or the date that the property was recovered, if recovered; and

(C) Interest on the unpaid balance each month at the current legal rate from the date the court orders the lessor or renter to pay replacement costs until the date the judgment is satisfied in full.

(4) If as a part of the order of the court the lessor or renter is placed on probation, supervision of said probation shall not be terminated until all replacement costs, fees, charges, penalties, interest, and other charges are paid in full. All payments relative to this Code section shall e made to the appropriate court of jurisdiction and the court shall make distribution to the owner within 30 days of receipt thereof.

(5) In the event that the owner incurs any expenses in the process of locating a lessor or renter who did not return any personal property according to the lease or rental agreement, the court shall provide that the lessor or renter reimburse toe owner for those expenses which may include, but not be limited to, credit reports, private detective fees, investigation fees, fees charged by a law enforcement agency for such services as police reports, background checks, fees involved with swearing out a warrant for incarceration, and any other bona fide expenses.

O.C.G.A. 16-8-2 THEFT BY TAKING

A person commits the offense of theft by taking when he unlawfully takes or, being in lawful possession thereof, unlawfully appropriates any property of

another with the intention of depriving him of the property, regardless of the manner in which the property is taken or appropriated.

(2)

No. 06-386

FILED
OCT 12 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

DR. MARGIE MCCRAE,

Petitioner,

v.

RUSSELL BERGER,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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INTRODUCTION

Petitioner has presented no compelling reasons to justify the grant of the Petition for a Writ of Certiorari ("Petition"). In fact, Petitioner has failed to proffer any evidence to demonstrate why the questions presented merit this Court's attention. Accordingly, the Petition should be denied.

STATEMENT OF THE CASE

On March 2, 2003, Petitioner, Margie McRae, pulled into an exact change tollbooth on the F.J. Torras Causeway between Brunswick and St. Simons Island. Petitioner contends that she attempted to pay the toll but missed the basket and proceeded to get out of her truck, pick up some coins and throw them into the coin basket. As Petitioner was attempting to leave, the tollbooth operator noticed that Petitioner had additional coins in her hand and believed that she had improperly picked up these coins. The tollbooth operator demanded that Petitioner return the change still in her hand and Petitioner refused. The tollbooth operator called the police.

Respondent, Brunswick Police Department officer Berger, arrived at the scene and took a witness statement from the tollbooth operator. She told him that she saw Petitioner get out of her truck and pick up numerous coins all around the coin basket. The tollbooth operator did not state exactly how many coins Petitioner picked up.

While there is disagreement on the exact nature of the conversation that occurred between Respondent and Petitioner, Respondent believed that during the course of

that conversation, Petitioner admitted to taking money other than her own. Respondent advised Petitioner that she could be arrested, and she responded by stating that she could not be arrested on hearsay. Respondent then told Petitioner to give the money back. Petitioner responded by saying there was no proof that the money belonged to the state. Petitioner offered no other information and made no other statements about the ownership of the money. When asked if she was going to pay the toll, Petitioner replied "I have already paid the toll," without answering the question directly and with no further explanation.

After this initial exchange, Respondent asked Petitioner who owned the vehicle she was driving. Petitioner continued to refuse to answer his questions directly and responded "What do you mean whose truck is this? You just ran the registration." Respondent again restated his question, and Petitioner told Respondent that this information was irrelevant. At this point, Petitioner having refused to return the money or pay the $0.35 toll, Respondent believed that an arrest would be proper. Accordingly, he placed Petitioner under arrest, charging her with theft by conversion.

Petitioner filed an action for damages in the United States District Court for the Southern District of Georgia on March 1, 2005, asserting various state claims and a claim for unlawful arrest in violation of the 4th Amendment, based on Respondent's alleged warrantless arrest without probable cause. The District Court found that all of Petitioner's claims failed as a matter of law because Respondent was entitled to qualified immunity. The District Court held that under the facts and circumstances known at the time of the arrest, a reasonable officer in the Respondent's position could have determined that there

was probable cause to conclude that Petitioner had taken coins from the tollbooth that were not her own in violation of O.C.G.A. § 32-10-64(e). The District Court subsequently granted Respondent's Motion for Summary Judgment on all claims. On the briefs and without permitting argument, the Eleventh Circuit Court of Appeals in a per curiam opinion found no error in the decision of the District Court and affirmed the judgment in all respects. The Eleventh Circuit further denied Petitioner's Motion for Rehearing.

REASONS FOR DENYING THE PETITION

The decisions of the District Court and the Eleventh Circuit do not conflict with any decision of this Court or any other Court of Appeals. They also do not implicate an important question of federal law that has not already been decided by this Court. In addition, Petitioner raises for the first time issues here that were never presented or passed upon in the courts below. Petitioner has never before contended and no court, in articulating the questions presented, ever found that the basis for the arrest of Petitioner was the arrest warrant. This was a warrantless arrest based on probable cause. Petitioner has therefore waived argument of this issue and it is not properly before this Court. *See Silber v. United States*, 370 U.S. 717, 717-18 (1962); *Duigan v. United States*, 274 U.S. 195, 200 (1927).

Further, Petitioner misstates the relevant ruling in this case. Neither the District Court, nor the Eleventh Circuit ever held that a police officer "may arrest if there is arguable probable cause." The judgment affirmed by the

Eleventh Circuit was the finding that a police officer is entitled to qualified immunity where a reasonable officer under the same circumstances could have concluded that there was probable cause that a crime had been committed. The District Court's discussion of arguable probable cause relates to the issue of whether an officer is entitled to qualified immunity, and not to the officer's overall authority to make a warrantless arrest under the Fourth Amendment.

I. The Eleventh Circuit and the District Court Correctly Held that Respondent Berger Was Entitled to Qualified Immunity under Federal Law

A. The District Court Correctly Applied the Relevant Standard to Determine Qualified Immunity

This Court has held that a defense based on qualified immunity must be evaluated according to a two step inquiry. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). The first step in the inquiry must be whether the facts alleged show that the officer's conduct violates a constitutional right. *Id.* The second step, assuming that a violation can be made out, is whether the right was clearly established such that it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. *Id.* at 200-02. If, under the facts alleged by the party asserting injury, no constitutional right would have been violated at all, there is no need for further inquiries concerning qualified immunity. *Id.* at 201.

The District Court considered the threshold question for qualified immunity, and viewing the facts in the light

most favorable to Petitioner, the court correctly found that no constitutional right was violated. Pet. App. at 9a. No constitutional violation can be made out on these facts, because Respondent Berger had probable cause to believe that Petitioner had committed a crime by taking coins around the tollbooth that were not her own in violation of O.C.G.A. 32-10-64(e). Petitioner asserts that Respondent Berger lacked definitive proof that she had picked up coins that were not her own and that the only reasonable interpretation of the facts was that she had merely retrieved her own coins. The District Court, however, viewing all facts in the light most favorable to Petitioner and drawing all justifiable inferences in her favor, found that Berger's interpretation of the facts and circumstances known to him at the time was a reasonable one, and thus Respondent is properly shielded from civil liability by qualified immunity. *See* Pet. App. at 9a.

The uncontroverted evidence within Respondent's knowledge at the time includes the following. First, the tollbooth operator stated that she had observed Petitioner picking up numerous coins from all around the toll basket, and stated that she saw additional coins in Petitioner's possession after the thirty-five cents required for the toll had been deposited. Petitioner makes much of the fact the tollbooth operator did not know the exact nature of the coins Petitioner picked up, nor how those coins came to be on the ground. Yet, such facts need not be proven for there to be probable cause. In fact, it was reasonable for an officer to conclude that Petitioner had picked up coins other than her own where the tollbooth operator witnessed Petitioner picking up numerous coins all around, saw her return to her vehicle with a handful of change and then witnessed her pull away with additional change still in her

hand after depositing the amount required for the toll. Likewise, it was reasonable to conclude that a person who had merely missed the basket would need to exit the vehicle only to pick up the change required to pay the toll, and would not still have a handful of change after depositing the toll.

Second, Respondent had knowledge of Petitioner's own statements regarding the money. Petitioner admits that her first statement to Respondent was that she could not be arrested on "hearsay" and that there was "no proof" that the money belonged to the state. Petitioner does not contend that she ever told Respondent that she had only picked up her own coins. Petitioner never stated that she only picked up two coins, and she does not contend that she made any other statements regarding the ownership of the coins.

Petitioner's repeated refusal to directly answer questions, together with the other facts and circumstances already known to Respondent Berger, could have caused a reasonable officer to conclude that Petitioner had committed a crime by taking coins other than her own. It was not unreasonable for an officer to conclude that a person who only asserts that there is "no proof" that the money belongs to the state, instead of affirmatively asserting that the money is their own, may be trying to conceal something, like the fact that they have just picked up coins that were not their own. The coins did not have to belong to the state for a crime to have been committed. The coins picked up only had to belong to someone other than Petitioner. Therefore, the District Court correctly held that Respondent had probable cause to believe that Petitioner had taken coins other than her own. Accordingly, because a reasonable officer under the facts alleged could have

believed that there was probable cause to arrest for a violation of O.C.G.A. § 32-10-64(e), Petitioner has not stated a violation of her Fourth Amendment rights sufficient to satisfy the first prong of the *Saucier* qualified immunity analysis.

Further, even if a constitutional violation could be made out on these facts, the District Court also correctly found that the right was not clearly established such that a reasonable officer would have understood that what he was doing violated that right. The District Court correctly found that a reasonable officer in Respondent's position, having the information he had at the time, could have concluded that there was probable cause to believe Petitioner had taken coins that were not her own. Pet. App. at 9a-10a. It would not have been at all clear to a reasonable officer that it was unlawful to arrest Petitioner where a witness saw her picking up numerous coins all around the tollbooth and drive away with additional coins still in her hand after paying the toll, and where Petitioner in response to questions would only state that there was "no proof" it was the state's money and that "hearsay" was not enough to arrest her. Therefore, in the situation confronting Respondent, it would not have been at all clear to a reasonable officer that arresting Petitioner for taking coins that were not her own was unlawful.

B. Respondent Is Entitled to Qualified Immunity if There Was Probable Cause to Believe Any Crime Had Been Committed

Although Petitioner was initially charged with theft by conversion, Respondent is still entitled to qualified immunity, so long as there was probable cause to arrest Petitioner for any crime. Throughout this case, Petitioner

has mistakenly found significant the fact that the District Court discussed probable cause in relation to O.C.G.A. § 32-10-64(e), instead of discussing probable cause in terms of either O.C.G.A. § 16-8-4, theft by conversion, the violation charged at the time of the arrest, or O.C.G.A. § 16-8-2, theft by taking, which Respondent discussed in his brief for Summary Judgment. Petitioner makes this same argument again with regard to the probable cause section of the arrest warrant which also mentions theft by conversion. However, so long as there was probable cause to believe Petitioner had committed any crime, then there was no constitutional violation and Respondent is entitled to qualified immunity. *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004).

Petitioner's argument here seems to be based on a misunderstanding of *Devenpeck v. Alford*. *Id.* The validity of an arrest does not turn on the offense announced by the officer at the time of the arrest. *Id.* In *Devenpeck*, this Court held that a warrantless arrest by a police officer is lawful under the Fourth Amendment as long as there is probable cause to believe that *any* criminal offense has been committed. *Id.* at 155.

While the facts upon which Respondent arrested Petitioner may not have supported the charge of theft by conversion, those same facts did support the belief that Petitioner had picked up coins other than her own in violation of either O.C.G.A. § 32-10-64(e), the tollbooth offense, or O.C.G.A. § 16-8-2, simple theft by taking. The District Court specifically discussed the application of O.C.G.A. § 32-10-64(e) to the facts in this case, and correctly applied the "any crime" standard announced by this Court in *Devenpeck*. *See* Pet. App. at 7a-8a. Therefore, when Respondent made an arrest supported by probable

cause to arrest for any offense, including O.C.G.A. § 32-10-64(e), neither the Respondent's subjective reliance on theft by conversion, nor the fact that he verbally announced the wrong offense, affects the fact that Respondent is entitled to qualified immunity. Because the constitutionality of the arrest does not depend on whether the officer identifies the correct offense, Respondent is still entitled to qualified immunity where there was probable cause to believe Petitioner committed a crime.

II. Qualified Immunity Does Not Depend on the Offense Being Witnessed or Committed in the Presence of the Officer

This Court has never articulated a constitutional in-the-presence requirement to arrest for a misdemeanor, and therefore the qualified immunity analysis is also not affected by whether the misdemeanor was witnessed or committed in the presence of an officer. In addition, Petitioner mistakenly concludes that because the tollbooth operator did not see the events before Petitioner picked up the coins, then the offense was "unwitnessed." However, the offense for which the District Court found probable cause was the act of picking up coins other than her own, and the record reflects and Petitioner admits that the tollbooth operator did witness Petitioner picking up numerous coins.

Further, every circuit, including the Eleventh Circuit, which has addressed the issue of whether the Fourth Amendment includes an in-the-presence requirement for warrantless misdemeanor arrests has held that it contains no such requirement. *See Knight v. Jacobsen*, 300 F.3d 1272, 1276 (11th Cir. 2002) (rejecting notion that state law procedures regarding warrantless arrests for

misdemeanors are written into the federal Constitution); *Pyles v. Raisor,* 60 F.3d 1211, 1215 (6th Cir. 1995) (finding right to be arrested for a misdemeanor only when committed in presence of arresting officer not grounded in federal Constitution); *Fields v. City of South Houston,* 922 F.2d 1183, 1189 (5th Cir. 1991) ("The United States Constitution does not require a warrant for misdemeanors not occurring in the presence of the arresting officer."); *Barry v. Fowler,* 902 F.2d 770, 772 (9th Cir. 1990) ("The requirement that a misdemeanor must have occurred in the officer's presence to justify a warrantless arrest is not grounded in the Fourth Amendment."); *Street v. Surdyka,* 492 F.2d 368, 372 (4th Cir. 1974).

Any such requirement has been historically grounded in state law, and is not required by the Fourth Amendment.[1] This Court, in *Atwater v. City of Lago Vista,* noted that there is a "legislative tradition of granting warrantless misdemeanor arrest authority and [a] judicial tradition of sustaining such statutes against constitutional attack." 532 U.S. 318, 343 (2001). In addition to declining to articulate a constitutional rule that would limit warrantless arrest authority for misdemeanors beyond probable cause, this Court noted that such a requirement would require sensitive case-by-case determinations and would convert every discretionary decision by an officer in the field into an occasion for constitutional review. *Id.* at 347. To add in a requirement that a misdemeanor be "witnessed" in order for an officer to be entitled to qualified immunity would create similar problems. Therefore, since

[1] Petitioner does not now, nor has she ever raised a claim under state law regarding the authority to arrest for a misdemeanor not committed in the officer's presence.

this Court has not articulated a constitutional requirement under the Fourth Amendment that a misdemeanor be committed in the officer's presence for the arrest to be lawful, and since the actions of Petitioner were witnessed in this case by the tollbooth operator, the District Court and the Eleventh Circuit correctly determined that Respondent is entitled to the shield of qualified immunity under federal law.

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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